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APPELLANT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 115 45.5

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 477.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Atlas Line Steamship Company, the appellant, was incorporated under the laws of the State of New Jersey on June 23, 1903 (R. 4-9). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Atlas Line Steamship Company was beneficially held for said German corporation from June, 1903, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Atlas Line Steamship Company to manage and control its affairs (R. 1-2). The Alien Property Custodian seized no money nor other property belonging to the Atlas Line Steamship Company, as such money or other property was recognized as belong-

ing to the Corporation and not to its stockholders. Through the Board of Directors, elected by the vote of said Alien Property Custodian, property of the Corporation was sold, including premises at 45 Broadway, New York City, which brought $2,000,000, and the proceeds of said sales are held in the treasury of the Corporation. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code.

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against

the United States in the sum of $14,250.00, with interest (R. 3), and the judgment entered in said Court and appealed from sustained a demurrer and dismissed said petition (R. 12).

Claimant below filed a motion on May 15, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 19). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 15, 1924, the Court of Claims allowed the appeal (R. 19).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized on June 23, 1903 (R. 1), that in the year 1913 it purchased three barges for $17,500.00, all of which barges it caused to be documented under the laws of the United States at New York on March 1, 1913, that said barges were used in its business carried on in the Port of New York until on or about the 6th day of April, 1917, when the commercial value of said barges was $14,250.00 and they were requisitioned by the Government of the United States (R. 2), that on or about April 16, 1917, The Depot Quartermaster, New York, acting under orders from the Secretary of War, upon direction of the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), took possession and assumed control of said barges (R. 2), that said barges, listed as "lighters," are included in the Executive Order made June 30, 1917 (R. 9-11), pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and title to said barges was taken by the United States, through the United States Shipping Board (R. 2), that claimant below founded its claim

upon said Act of August 29, 1916, upon the provision of the Constitution of the United States reading "nor shall private property be taken for public use, without just compensation," said Joint Resolution and/or an implied contract with the Government of the United States arising out of the facts stated in said petition (R. 3), and that no compensation has been paid to claimant below for its property so taken and used (R. 3). Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that it is without jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 19), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court of Claims, one (R. 12) entered March 17th, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 19) entered May 26, 1924, overruling claimant's motion of May 15, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing

this case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaintiff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co., Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc., Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE.

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

1. That Atlas Line Steamship Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 23rd day of June, A. D. 1903 (R. 1).

2. That in the year A. D. 1913, said corporation at a cost, or expenditure, of $17,500.00, acquired title to and became the owner of three barges named the "ARNI" (Official Number 29998), the "ARGOS" (Official Number 30060), and the "AROA" (Official Number 30062), respectively, all of which were documented under the laws of the United States, at New York, on March 1, 1913, under Permanent Enrollment Numbers 465, 466 and 467, respectively, and said barges were used in claimant's business carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States, as hereinafter mentioned, when said barges had a market or commercial value estimated at $14,250.00, apportioned as follows:

"ARNI" $3,000.00
"ARGOS" $6,450.00
"AROA" ..... $4,800.00 (R. 2)

3. That on or about the sixth day of April, A. D. 1917, in the Port of New York, City and State of New York, the United States of America by the Treasury Department, acting through customs officials, requisitioned said barges, and soon thereafter said barges were transferred to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having, on April 16, 1917, ordered The Depot Quartermaster, New York, to take possession and assume control thereof (R. 2).

4. That all of said barges, listed as "lighters," are included in an Executive Order made on the thirtieth day of June, 1917 (R. 9-11), and pursuant to said Executive Order and the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of the aforementioned barges were taken over to the United States, by and through the United States Shipping Board (R. 2).

5. That claimant, as the sole owner of the claim set forth in said petition, and not having assigned or transferred said claim or any part thereof or interest therein, and having at all times borne true allegiance to the Government of the United States, reading into the authority under which its property was so taken, the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which said suit was brought, upon said provision of the Constitution of the United States, said Act of August 29, 1916, and upon said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts and warranting the inference of an agreement on the part of the said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has

been deprived of the use of its property, or for the time of the withholding of said price from claimant since the claim first accrued, no compensation having at any time been awarded or paid to claimant by the Government of the United States on said claim (R. 3).

6. That claimant brought no suit on this claim, other than the said suit in the Court of Claims, against the Government of the United States or anyone acting for it (R. 3).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 1), the demurrer being worded, as follows:

> "Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States." (R. 11.)

On March 17, 1924, the Court of Claims entered an order, as follows:

> "This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, It is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is sustained, and the amended petition is dismissed." (R. 12.)

SPECIFICATION OF ERRORS.

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

3. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT.

I.

The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R. 11).

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of three separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in like instances. The first of said three separate takings gave the United States temporary police control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, the barges "ARNI," "ARGOS" and "AROA," for the transfer or transportation of troops, war

material and equipment, or for such other purposes connected with the then existing emergency as were needful. The third of said takings, under the Joint Resolution of May 12, 1917 (40 Stat. 75) vested the title, as well as the possession, of said barges in the United States. It is submitted that any of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, or its title thereto, under proper legislative authority, created an obligation on the part of the Government to make just compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that deprived appellant of the use and occupation of its property, and the other that deprived it of the title to its said property. It nowhere appears in the record that the Government was without due

authority to deprive appellant of either the use and occupation of said property or the title to said property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in any of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of both the use and occupation of appellant's said property and of appellant's title thereto, and it appears further in said record that the use and occupation of said property was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and that the taking of claimant's title to said property by the Government was pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and it appears also in said petition that said property, when taken, had a commercial value estimated at $14,250.00 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is submitted, therefore, that if the taking of either such use and occupation or the title to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the provisions of said Act of Congress of August 29, 1916 (39 Stat. 645) and the other pursuant to the provisions of the Joint Resolution of May 12, 1917 (40 Stat. 75), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all

the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

If the Court of Claims had not sustained the demurrer to the petition, so as to have permitted appellant to present testimony in proof of its case, the alleged fact that the Government had taken appellant's property, pursuant to the provisions of the Act of Congress of August 29, 1916 (39 Stat. 645), could have been fully proven by placing in evidence a letter written April 16, 1917, by Newton D. Baker, Secretary of War, to The Depot Quartermaster, New York (through The Quartermaster General) advising that under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), the President directs that The Depot Quartermaster take possession and assume control, for the purposes stated in said Act of Congress, and to utilize the same to the exclusion of all other traffic, of appellant's said property, and directing The Depot Quartermaster to notify the persons in possession of said property, and the owners thereof, if known, of the contents of the order and to furnish them with copies of the same, and appellant could further offer in evidence written notice from The Depot Quartermaster, New York, to appellant, giving said notice.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II.

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S. 163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court

of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."
>
> 2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 15.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

"When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

III.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 12-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was said Joint Resolution of May 12, 1917 (40 Stat. 75) only, while in appellant's case there is a further legislative basis upon which to found the elements of contractual liability in the Government taking claimant's property under the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of

contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract. Even if the said Joint Resolution (40 Stat. 75) afforded appellant no legislative basis upon which to found the elements of contractual liability to sustain an implied contract within the jurisdiction of the Court of Claims to hear and determine, and to award just compensation to appellant for its title to its three barges which passed to the United States in the execution of the Executive Order made June 30, 1917 (R. 9-11), the Court of Claims erred in sustaining the demurrer to claimant's petition and dismissing said petition, provided the taking of the use and occupation of said three barges by the United States under the Act of Congress of August 29, 1916 (39 Stat. 645), afforded such legislative basis, for the facts alleged in the petition set up two distinct takings, one the use and occupation of appellant's vessel property and the other appellant's title to said property, and in the nature of two counts in said petition appellant sought just compensation for each and/or both of said takings, and, if appellant made out in its said petition a cause of action against the United States within the jurisdiction of the Court of Claims under either of the takings alleged in said petition, the demurrer should have been overruled and appellant's case should have been heard and determined under the good count.

In said Opinion, to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See

Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." (R. 14-15).

The "Trading with the enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Joint Resolution (40 Stat. 75) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since June 23, 1903, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was vessel property, consisting of three barges, named the "ARNI" (Official Number, 29998), the "ARGOS" (Official Number, 30060),

and the "AROA" (Official Number, 30062), all of which were documented under the laws of the United States, at New York, on March 1, 1913, under Permanent Enrollment Numbers 465, 466 and 467, respectively, and said barges were used in claimant's business, carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States (R. 2). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said three barges of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading with the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimer Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized

the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 15): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said vessel property of appellant came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75) only in that prior to appellant taking title to said vessels in 1913 they were owned by the Hamburg-American Line, a German corporation, and had German register. If said Joint Resolution was intended as a war measure for

the *capture* of enemy property, and was not intended as an authorization act for the *taking* of property under the right of eminent domain which would carry compensation to the owner, and made no adequate provision either for the return of the property to its proper owner or for the giving of just compensation to said owner if non-enemy property was taken thereunder by mistake, said Joint Resolution, when applied to non-enemy property, would be in contravention of the Constitutional rights of the non-enemy owner not to be deprived of life, liberty or property, without due process of law, and not to have his private property taken without just compensation, as to create an obligation on the part of the Government to compensate such owner and a Constitutional basis on which to found a claim upon implied contract within the statutory jurisdiction of the Court of Claims to hear and determine.

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, but was documented under the laws of the United States, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft (R. 12-19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

Not only is appellant an American corporation, and not only were its vessels with American documentation questionably within the scope of said Joint Resolution (40 Stat. 75), but said vessels were already in the possession and use of the United States when the President made the order (R. 9-11) on June 30, 1917, directing the possession and title of said vessels to be taken over to the United States through the United States Shipping Board, as the Secretary of War, upon directions from the President, ordered on April 16, 1917, said vessels transferred to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service (R. 2), pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1) (39 Stat. 645). Are

not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

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